M-CONCEPT SDN BHD

v.

BERJAYA TIMES SQUARE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J
[ORIGINATING SUMMONS NO: S3-24-473-2003]
6 MAY 2004

CONTRACT: *Breach - Building contract - Agreement for sale of shop-lot in building - Vendor unable to deliver vacant possession by specified time - Whether purchaser entitled to rescind agreement, recover moneys paid and claim damages - Whether claim for liquidated damages for late delivery disentitled purchaser from rescinding agreement - No provision on rescission in agreement, whether consequential - Purchaser continuing to make instalment payments, whether a waiver of right to rescission - Contracts Act 1950, s. 56(1)*

CONTRACT: *Rescission - Building contract - Agreement for sale of shop-lot in building - Vendor unable to deliver vacant possession by specified time - Whether purchaser entitled to rescind agreement, recover moneys paid and claim damages - Whether claim for liquidated damages for late delivery disentitled purchaser from rescinding agreement - No provision on rescission in agreement, whether consequential – Purchaser continuing to make instalment payments, whether a waiver of right to rescission - Contracts Act 1950, s. 56(1)*

This was an application by the plaintiff/purchaser for a declaration that it be entitled to rescind the sale and purchase agreement it entered into earlier with the defendant/vendor in respect of a commercial shop-lot in the Berjaya Times Square. The agreement was dated 24 August 1995 and it provided, *inter alia*, that time was of the essence, and that the defendant was to deliver vacant possession of the shop-lot to the plaintiff on or before 23 November 1998 ('the specified date'). As it transpired, the plaintiff had paid the defendant the sum of RM1,034,793.90, being 90% of the total purchase price, but the defendant was unable to deliver vacant possession of the shop-lot to the plaintiff by the specified date. Thereafter, the plaintiff decided to rescind the agreement on the ground that the defendant had committed a fundamental breach of the agreement but this was rejected by the defendant on account that, already being entitled to claim liquidated damages for late delivery, the

plaintiff could not rescind the agreement. Indeed, as at 20 March 2003, when the instant originating summons was filed, vacant possession of the shop-lot had yet to be delivered.

Held (allowing the application):

[1] The inability of the defendant to deliver vacant possession of the shop-lot to the plaintiff for such an unreasonably lengthy period of time constituted a fundamental breach of the agreement, thereby entitling the plaintiff to rescind the agreement. Indeed, time was of the essence of the agreement, and the excessive delay on the part of the defendant had rendered the agreement voidable at the option of the plaintiff [Contracts Act 1950, s. 56(1)]. This was so irrespective of the fact that the agreement did not contain a provision on rescission or the fact that the plaintiff was also entitled to claim liquidated damages for late delivery. (pp 855 e-h & 856 a)

[1b] Although the plaintiff did continue to make the instalment payments due under the agreement, it could not, on that account, be considered as having waived its right to the remedy of rescission. It was not open to the defendant to rely on estoppel here. (p 856 b-e)

[Plaintiff's application for declaration allowed; moneys paid ordered to be refunded; damages to be assessed; defendant's oral application for stay of execution refused.]

Legislation referred to:
Contracts Act 1950, s. 56(1)

For the plaintiff - SC Cheah; M/s Lee Hishamudin
For the defendant - VK Lingam (VL Lakshmi); M/s VK Lakshmi & Co

Reported by Gan Peng Chiang

JUDGMENT

Hishamudin Yunus J:
This originating summons is essentially the plaintiff's application for a declaration that the plaintiff be entitled to rescind a sale and purchase agreement dated 24 August 1995 (hereinafter referred to as the 'agreement') entered into between the plaintiff as purchaser and the defendant as seller in respect of a property known as parcel No. 07-63, Commercial Shop Lot, Berjaya Star City (now known as Berjaya Times Square) held under Grant No. 7866, Lot No. 339, and Grant No. 10798, Lot No. 145, both of which located in Section 52 of Kuala Lumpur (hereinafter referred to as 'the property').

I shall begin with a summary of the facts relevant to this action. The plaintiff and the defendant entered into the agreement on 24 August 1995. Pursuant to cl. 22(1) of the agreement, the defendant was required to deliver vacant possession of the property to the plaintiff on or before 23 November 1998 (hereinafter referred to as 'the stipulated date'). Clause 32 of the agreement provides that time shall be of the essence in relation to all provisions.

In fulfillment of its obligations under cl. 3(1) of the agreement, the plaintiff has paid RM1,034,793.90, being 90% of the total purchase price to the defendant, part of which was financed by a loan from AmBank Berhad.

Although the plaintiff has fulfilled its obligations in respect of the payment, the defendant has failed to deliver vacant possession of the property to the plaintiff on or before the stipulated date.

Even on 20 March 2003, that is the date when the plaintiff filed this originating summons, the defendant had still failed to deliver vacant possession of the property.

After the stipulated date, the plaintiff's director, Lee Teen Nguan, had met with the sale and marketing officers of the defendant and despite several assurances given by, among others, Ms Esther/Ms Pey Yee, who promised that the property would be completed by the end of 2001, the defendant still failed to deliver vacant possession of the property to the plaintiff as promised.

Upon the defendant's failure to fulfil its obligations under the agreement, the plaintiff's former solicitors, Messrs Gan & Low, issued a letter dated 27 December 2001 to inform the defendant that the plaintiff had decided to rescind the agreement on the ground that the defendant had committed a fundamental breach of its contractual obligation to deliver vacant possession of the property to the plaintiff by the stipulated date pursuant to cl. 22(1) of the agreement.

However, the defendant refused to accept the rescission of the agreement by the plaintiff. By a letter dated 3 January 2002, the defendant claimed that as the plaintiff would be entitled to claim for liquidated damages in the event of late delivery of the property, the plaintiff was not entitled to rescind.

Subsequently, the plaintiff sought consent and obtained reassignment of all rights, title and interests from AmBank Berhad to institute legal proceedings against the defendant.

On 1 October 2002, the plaintiff's director, Lee Teen Nguan, met with the defendant's sale and marketing officer, Ms Dianne Chan, and the latter gave her assurance that vacant possession of the property would be delivered by the end of 2002. Despite this assurance, the defendant again failed to deliver vacant possession of the property.

Accordingly, on 5 March 2003 the plaintiff's solicitors sent a letter to demand that the defendant accept the rescission, to refund the monies paid, and to pay all damages suffered by the plaintiff within 14 days. However, the defendant again refused to accept the rescission and to refund the monies paid and to pay all damages suffered by the plaintiff.

The defendant instead sent a letter dated 10 March 2003 to the plaintiff's solicitors to inform that the defendant was not agreeable to the rescission by the plaintiff.

Hence the plaintiff filed the present originating summons to seek a declaration that it is entitled to rescind/terminate the agreement; to seek a refund of the monies paid; and to recover all damages suffered as a result of the defendant's breach of the agreement.

The essential issue which needs to be determined by this court is whether the failure by the defendant to deliver vacant possession of the property on or before the stipulated date, as provided under cl. 22(1) of the agreement, or on or before any other date as promised by the defendant, constitutes a fundamental breach of the contract which entitles the plaintiff to rescind the agreement. In my judgment, considering the unreasonably long delay to deliver vacant possession, the answer to this question must be in the affirmative. The failure of the defendant to deliver vacant possession of the property after 23 November 1998, as agreed under cl. 22(1) of the agreement, for nearly four years and four months until the present originating summons was filed, amounts to a fundamental breach of the agreement by the defendant. The delay on the part of the defendant is excessive and unreasonable given the fact that the defendant was required to deliver vacant possession of the property to the plaintiff within 36 months from the date of signing of the agreement. As under the agreement time is essential, the failure on the part of the defendant to deliver vacant possession at the stipulated time renders the agreement voidable at the option of the plaintiff (see s. 56(1) of the Contracts Act 1950).

The defendant contends that the plaintiff is not entitled to rescind the agreement since there is no provision in the agreement giving the plaintiff the right to terminate the agreement. In the light of s. 56(1) of the Contracts Act, there is clearly no merit in this argument.

The defendant next contends that the plaintiff is not entitled to rescind the agreement since the plaintiff is, in any event, entitled to claim liquidated damages. Again, based on s. 56(1) there is no merit in this argument.

It is further argued by the defendant that the plaintiff is estopped from rescinding the agreement (or had waived its right to do so) because the plaintiff has paid its installments due under the agreement without protest. This argument too must be rejected. On the facts, it is unjust to estop the plaintiff from rescinding the agreement; the plaintiff is the innocent party and all that it did in making the payments was to honour its obligations under the agreement. And on the facts it cannot be said that there was no protest from the plaintiff over the long delay. It must also be pointed out that the plaintiff was not happy in continuing making the payments but it had been induced into doing so by the defendant's officers through the latter's assurances on the completion date that eventually turned out to be nothing but empty promises as the property was never completed by either the end of 2001 or the end of 2002. Moreover, the defendant by breaching the agreement has not come to court with clean hands; and a party who has not come to court with clean hands cannot pray in aid principles of equity such as the doctrine of estoppel.

Accordingly, the court granted the declaration prayed for under the originating summons together with the various ancillary reliefs. That is to say, the court granted the following prayers:

(1) prayer 1 (declaration on plaintiff's right to rescind);

(2) prayer 2(a) – but the amount was varied to RM1,149,771 as the plaintiff has fully settled the purchase price;

(3) prayer 2(b) (financing costs, legal costs and miscellaneous costs);

(4) prayer 2(c) and (d) – subject to assessment by the senior assistant registrar;

(5) prayers 3 (usual 8% interest under the Rules of the High Court;

(6) prayer 4 (costs of this action).

[Order in terms]

[Oral application for stay of execution was dismissed on the grounds that the Court was not satisfied that there are special circumstances.]